

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DENNIS J. OWEN,)	
)	No. CV-09-183-JPH
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
MICHAEL J. ASTRUE, Commissioner)	
of Social Security,)	
)	
Defendant.)	
)	
)	

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on March 19, 2010 (Ct. Rec. 16, 18). Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney David Johnson represents the Commissioner of Social Security (Commissioner). The parties have consented to proceed before a magistrate judge (Ct. Rec. 8). Plaintiff filed a reply on March 4, 2010 (Ct. Rec. 20). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 18) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 16).

JURISDICTION

Plaintiff has filed three applications for supplemental security income (SSI), on August 12, 1999, January 15, 2004, and July 10, 2006 (Tr. 337). [The decision under review, issued November 19, 2008, consolidated all three applications (Tr. 337).] The Administrative Law Judge (ALJ) held hearings on May 6, 2008,

1 and September 11, 2008 (Tr. 931-965, 966-1002). Plaintiff,
2 represented by counsel, medical expert George Rodkey, M.D.,
3 psychologist Margaret Moore, Ph.D., and vocational expert K. Diane
4 Kramer, testified. Plaintiff's counsel stipulated to a step five
5 determination at the last hearing (Tr. 1002). On November 19,
6 2008, the ALJ issued a decision finding plaintiff is disabled when
7 substance abuse is included because his impairments meet the
8 requirements of Listing nos. 12.02,12.04,12.08, and 12.09 (Tr.
9 337-348). Having concluded plaintiff is disabled when his
10 substance abuse is included, the ALJ then addressed whether
11 plaintiff's substance abuse is a contributing factor material to
12 the disability determination. The ALJ found at step four of the
13 next sequential evaluation that if even plaintiff stopped abusing
14 substances (when DAA is excluded), he would be unable to perform
15 his past relevant work (Tr. 346). Finally, the ALJ determined if
16 plaintiff stopped his substance abuse, there are a number of jobs
17 in the national economy he can perform; therefore, he is not
18 disabled (Tr. 340-343,347-348). The Appeals Council denied review
19 on June 2, 2009 (Tr. 320-323). Therefore, the ALJ's decision
20 became the final decision of the Commissioner, which is appealable
21 to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff
22 filed this action for judicial review pursuant to 42 U.S.C. §
23 405(g) on June 17, 2009 (Ct. Recs. 1,4).

24 **STATEMENT OF FACTS**

25 The facts have been presented in the record and in the briefs
26 of both plaintiff and the Commissioner, and will only be
27 summarized here.

28 Plaintiff was 38 years old when he applied for benefits in

1 1999. He did not graduate from high school but earned a GED (Tr.
2 337,346,970-971). Mr. Owen owned a flooring business from 1993 to
3 1999 and worked as a carpet layer, a job described as heavy by the
4 VE (Tr. 346,971-972). Plaintiff alleges disability since his
5 application date due to hepatitis C and cirrhosis, a stroke
6 suffered in 2003 or 2004 secondary to methamphetamine overdose, an
7 inability to stand for long periods, depression, anxiety, memory
8 problems, chronic obstructive pulmonary disease (COPD), and acid
9 reflux (Tr. 972-974,976-977,989,995-996).

10 SEQUENTIAL EVALUATION PROCESS

11 The Social Security Act (the Act) defines "disability"
12 as the "inability to engage in any substantial gainful activity by
13 reason of any medically determinable physical or mental impairment
14 which can be expected to result in death or which has lasted or
15 can be expected to last for a continuous period of not less than
16 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act
17 also provides that a Plaintiff shall be determined to be under a
18 disability only if any impairments are of such severity that a
19 plaintiff is not only unable to do previous work but cannot,
20 considering plaintiff's age, education and work experiences,
21 engage in any other substantial gainful work which exists in the
22 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus,
23 the definition of disability consists of both medical and
24 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
25 (9th Cir. 2001).

26 The Commissioner has established a five-step sequential
27 evaluation process for determining whether a person is disabled.
28 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person

1 is engaged in substantial gainful activities. If so, benefits are
2 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
3 the decision maker proceeds to step two, which determines whether
4 plaintiff has a medically severe impairment or combination of
5 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

6 If plaintiff does not have a severe impairment or combination
7 of impairments, the disability claim is denied. If the impairment
8 is severe, the evaluation proceeds to the third step, which
9 compares plaintiff's impairment with a number of listed
10 impairments acknowledged by the Commissioner to be so severe as to
11 preclude substantial gainful activity. 20 C.F.R. §§
12 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
13 App. 1. If the impairment meets or equals one of the listed
14 impairments, plaintiff is conclusively presumed to be disabled. If
15 the impairment is not one conclusively presumed to be disabling,
16 the evaluation proceeds to the fourth step, which determines
17 whether the impairment prevents plaintiff from performing work
18 which was performed in the past. If a plaintiff is able to perform
19 previous work, that plaintiff is deemed not disabled. 20 C.F.R. §§
20 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's
21 residual functional capacity ("RFC") assessment is considered. If
22 plaintiff cannot perform this work, the fifth and final step in
23 the process determines whether plaintiff is able to perform other
24 work in the national economy in view of plaintiff's residual
25 functional capacity, age, education and past work experience. 20
26 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*,
27 482 U.S. 137 (1987).

28 The initial burden of proof rests upon plaintiff to establish

1 a *prima facie* case of entitlement to disability benefits.
2 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
3 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
4 met once plaintiff establishes that a physical or mental
5 impairment prevents the performance of previous work. The burden
6 then shifts, at step five, to the Commissioner to show that (1)
7 plaintiff can perform other substantial gainful activity and (2) a
8 "significant number of jobs exist in the national economy" which
9 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
10 Cir. 1984).

11 Plaintiff has the burden of showing that drug and alcohol
12 addiction (DAA) is not a contributing factor material to
13 disability. *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001).
14 The Contract with America Advancement Act of 1996 (CAAA) bars
15 payment of benefits when drug addiction and/or alcoholism is a
16 contributing factor material to a disability claim. 42 U.S.C. §§
17 423 (d)(2)(C) and 1382(a)(3)(J); *Bustamante v. Massanari*, 262 F.3d
18 949 (9th Cir. 2001); *Sousa v. Callahan*, 143 F.3d 1240, 1245 (9th
19 Cir. 1998). If there is evidence of DAA and the individual
20 succeeds in proving disability, the Commissioner must determine
21 whether DAA is material to the determination of disability. 20
22 C.F.R. §§ 404.1535 and 416.935. If an ALJ finds that the claimant
23 is not disabled, then the claimant is not entitled to benefits and
24 there is no need to proceed with the analysis to determine whether
25 substance abuse is a contributing factor material to disability.
26 However, if the ALJ finds that the claimant is disabled, then the
27 ALJ must proceed to determine if the claimant would be disabled if
28 he or she stopped using alcohol or drugs.

STANDARD OF REVIEW

Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold the Commissioner's decision, made through an ALJ, when the determination is not based on legal error and is supported by substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). "The [Commissioner's] determination that a plaintiff is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570,572 (9th Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,1119 n. 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599,601-602 (9th Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573,576 (9th Cir. 1988). Substantial evidence "means such evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389,401 (1971)(citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289,293 (9th Cir. 1965). On review, the Court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20,22 (9th Cir. 1989)(quoting *Kornock v. Harris*, 648 F.2d 525,526 (9th Cir. 1980)).

It is the role of the trier of fact, not this Court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the Court

1 may not substitute its judgment for that of the Commissioner.
2 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577,579 (9th
3 Cir. 1984). Nevertheless, a decision supported by substantial
4 evidence will still be set aside if the proper legal standards
5 were not applied in weighing the evidence and making the decision.
6 *Browner v. Secretary of Health and Human Services*, 839 F.2d
7 432,433 (9th Cir. 1987). Thus, if there is substantial evidence to
8 support the administrative findings, or if there is conflicting
9 evidence that will support a finding of either disability or
10 nondisability, the finding of the Commissioner is conclusive.
11 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

12 **ALJ'S FINDINGS**

13 At step one the ALJ found Mr. Owen did not engage in
14 substantial gainful activity after he applied for benefits (Tr.
15 340). At steps two and three, ALJ Payne found plaintiff suffers
16 from hepatitis C, mild stroke¹, COPD, polysubstance abuse,
17 cognitive disorder, dysthymic disorder, substance-induced mood
18 disorder, and avoidant personality disorder, impairments that meet
19 Listings 12.02, 12.04, 12.08, and 12.09 when DAA is included.
20 Accordingly, he found plaintiff disabled when DAA is included (Tr.
21 340). Proceeding to the alternate five step evaluation as
22 required, the ALJ found if Mr. Owen stopped abusing substances,
23 his impairments would be severe but not of Listings-level
24 severity (steps two and three)(Tr. 341-342). At step four, relying

25
26 ¹Mr. Owen suffered a stroke and was brought to the ER on
27 December 6, 2003. He tested positive for amphetamine and
28 methamphetamine, as well as traces of cocaine and THC. The record
indicates the stroke was secondary to methamphetamine overdose (Tr.
491-493,902).

1 on the VE, the ALJ found even if Mr. Owen stopped abusing
2 substances, he would be unable to perform his past work. At step
3 five, again relying on the VE, the ALJ found plaintiff's RFC for a
4 range of light work enables him to work as a mail clerk, survey
5 worker, and parking lot cashier (light exertion), as well as at
6 sedentary jobs such as charge account clerk, telephone quotation
7 clerk, and surveillance system monitor (Tr. 346-347). The ALJ
8 found DAA was a contributing factor material to the disability
9 determination (Tr. 347). Accordingly, the ALJ found plaintiff is
10 barred from receiving benefits and therefore not disabled as
11 defined by the Social Security Act (Tr. 348).

12 ISSUES

13 Plaintiff contends the Commissioner erred as a matter of law
14 when the ALJ failed to properly credit medical opinions and found
15 DAA materially contributes to the disability finding. Mr. Owen
16 does not challenge the ALJ's negative assessment of his
17 credibility. The Commissioner asserts the Court should affirm the
18 ALJ's decision because it is without error and supported by the
19 evidence (Ct. Rec. 19 at 17).

20 ///

21 DISCUSSION

22 A. Weighing medical evidence

23 In social security proceedings, the claimant must prove the
24 existence of a physical or mental impairment by providing medical
25 evidence consisting of signs, symptoms, and laboratory findings;
26 the claimant's own statement of symptoms alone will not suffice.
27 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
28 on the basis of a medically determinable impairment which can be

1 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
2 medical evidence of an underlying impairment has been shown,
3 medical findings are not required to support the alleged severity
4 of symptoms. *Bunnell v. Sullivan*, 947, F.2d 341,345 (9th Cr.
5 1991).

6 A treating physician's opinion is given special weight
7 because of familiarity with the claimant and the claimant's
8 physical condition. *Fair v. Bowen*, 885 F.2d 597,604-605 (9th Cir.
9 1989). However, the treating physician's opinion is not
10 "necessarily conclusive as to either a physical condition or the
11 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d
12 747,751 (9th Cir. 1989)(citations omitted). More weight is given
13 to a treating physician than an examining physician. *Lester v.*
14 *Cater*, 81 F.3d 821,830 (9th Cir. 1995). Correspondingly, more
15 weight is given to the opinions of treating and examining
16 physicians than to nonexamining physicians. *Benecke v. Barnhart*,
17 379 F.3d 587,592 (9th Cir. 2004). If the treating or examining
18 physician's opinions are not contradicted, they can be rejected
19 only with clear and convincing reasons. *Lester*, 81 F.3d at 830. If
20 contradicted, the ALJ may reject an opinion if he states specific,
21 legitimate reasons that are supported by substantial evidence. See
22 *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1435,1463
23 (9th Cir. 1995).

24 In addition to the testimony of a nonexamining medical
25 advisor, the ALJ must have other evidence to support a decision to
26 reject the opinion of a treating physician, such as laboratory
27 test results, contrary reports from examining physicians, and
28 testimony from the claimant that was inconsistent with the

1 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d
2 747,751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d at 1042-43
3 (9th Cir. 1995).

4 **B. Evidence of mental impairment**

5 Mr. Owen asserts the ALJ's failure to properly credit the
6 evidence of mental impairment resulted in a flawed RFC (Ct. Rec.
7 17 at 13). Specifically, he alleges the ALJ improperly weighed the
8 opinions of: (1) two testifying psychologists: Margaret Moore,
9 Ph.D., who testified at the current hearing, and W. Scott Mabee,
10 Ph.D., who testified at a hearing in 2003; Dr. Mabee later
11 evaluated plaintiff twice; (2) examining professionals Clark
12 Ashworth, Ph.D., Dennis R. Pollack, Ph.D., Lance Harris, Ph.D.,
13 Gregory Charboneau, Ed.D., Angelique Tindall, Ph.D., and treatment
14 provider Amy Burns, M.D.; and (3) agency reviewing psychologist
15 Michael Brown, Ph.D. (Ct. Rec. 17 at 13-23).

16 As indicated, the ALJ found plaintiff disabled when DAA is
17 included. Because he found Mr. Owen disabled, here at step three
18 of the first five step evaluation, the only relevant inquiry on
19 appeal is whether the second five step determination is supported
20 by the evidence and free of legal error.

21 Plaintiff alleges the ALJ gave too much credit to Dr. Moore's
22 testimony. He asserts the ALJ failed as a matter of law to
23 properly allocate the burden of proving DAA is material to the
24 disability finding.

25 With respect to his second argument, Mr. Owen alleges if the
26 ALJ is unable to determine whether DAA is a contributing factor
27 material to determining disability, plaintiff's burden has been
28 met and he is entitled to benefits (Ct. Rec. 17 at 19). According

1 to plaintiff, when there is a "tie" as to whether the materiality
2 of DAA has been established, he wins (Ct. Rec. 17 at 19). As
3 support, plaintiff's opening and reply briefs cite two out of
4 circuit cases, *Brueggemann v. Barnhart*, 348 F.3d 689,693 (8th Cir.
5 2003); *cf. Sailors v. Barnhart*, 292 F.Supp.2d 1190 (D.Neb.
6 2003)(Ct. Recs. 17 at 19, 20 at 2).

7 The ALJ, on the other hand, appropriately relies on recent
8 precedent from this Circuit:

9 The undersigned gives... significant weight to
10 the assessments done by Dr[.] Moore who [was] able
11 to review the claimant's entire current medical
12 record... Dr. Moore originally listed some mental
13 limitations the claimant would have if he stopped
14 using drugs, but on further consideration, she
15 stated that she could not determine what [his]
16 mental limitations would be absent his substance
17 abuse. Exhibit B-47(F).

18 The undersigned finds that the claimant has not
19 carried his burden of proof to show he had mental limitations
20 absent substance abuse. In *Parra v. Astrue*,² [the Ninth Circuit] clarified the burden
21 of proof in the contributing factor analysis for
22 materiality.

23 First, the court explained that where the claimant
24 satisfies the step five analysis, it is not correct
25 that the Commissioner should bear the burden of
26 proving that benefits should be denied. Rather, the
27 burden is placed on the claimant, since the claimant
28 "is the party best suited to demonstrate whether she
would still be disabled in the absence of drug or
alcohol addiction."

Citing *Brown v. Apfel*, 192 F.3d 492,498(5th Cir. 1999),
the *Parra* court continued that even where a medical
expert called by the [ALJ] testifies that the
evidence is inconclusive as to whether a disabling
condition would resolve itself, if the claimant
stopped using alcohol or drugs, that this state of
affairs would not be sufficient to satisfy the
claimant's burden of proof.

²481 F.3d 742 (9th Cir. 2007), *cert. denied*, 552 U.S. 1141,
128 S.Ct. 1068 (2008).
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1 The court rejected the argument that the burden of
2 proof may be shifted to the Commissioner on the
3 materiality issue, since such an interpretation
4 runs contrary to the purpose of the statute, i.e.,
to "discourage alcohol and drug abuse, or at least
not to encourage it with a permanent government
subsidy."

5 As an example, the court stated an alcoholic
6 claimant who presented inconclusive evidence of
7 materiality would have no incentive to stop drinking
8 because abstinence would cause his claim to be
9 rejected. The claim would be guaranteed only as long
as the substance abuse continued, and this
interpretation amounts to a scheme that effectively
subsidizes substance abuse in contravention of the
statute's purpose.

10 (Tr. 344).

11 As the Commissioner points out, plaintiff fails to cite,
12 distinguish, or otherwise mention *Parra*, the case relied on by the
13 ALJ (Ct. Rec. 19 at 6-7).

14 The ALJ applied the correct law. This court recently noted,
15 relying on *Parra*, "if the claimant is found disabled with the
16 effects of substance addiction, it is the claimant's burden to
17 prove substance addiction is not a contributing factor material to
18 her disability." *Karol v. Astrue*, 2009 WL 3160352 (E.D.
19 Wash.)(citing *Parra v. Astrue*, 481 F.3d at 748). Plaintiff's
20 argument is without merit.

21 The ALJ considered plaintiff's credibility when he weighed
22 the conflicting opinions. He found plaintiff less than fully
23 credible, a finding Mr. Owen does not challenge on appeal (Tr.
24 344). Credibility determinations bear on evaluations of medical
25 evidence when an ALJ is presented with conflicting medical
26 opinions or inconsistency between a claimant's subjective
27 complaints and diagnosed condition. See *Webb v. Barnhart*, 433 F.3d
28 683,688 (9th Cir. 2005).

1 It is the province of the ALJ to make credibility
2 determinations. *Andrews v. Shalala*, 53 1035,1039 (9th Cir. 1995).
3 However, the ALJ's findings must be supported by specific cogent
4 reasons. *Rashad v. Sullivan*, 903 F.2d 1229,1231 (9th Cir. 1990).
5 Once the claimant produces medical evidence of an underlying
6 medical impairment, the ALJ may not discredit testimony as to the
7 severity of an impairment because it is unsupported by medical
8 evidence. *Reddick v. Chater*, 157 F.3d 715,722 (9th Cir. 1998).
9 Absent affirmative evidence of malingering, the ALJ's reasons for
10 rejecting the claimant's testimony must be "clear and convincing."
11 *Lester v. Chater*, 81 F.3d 821,824 (9th Cir. 1995). "General
12 findings are insufficient: rather the ALJ must identify what
13 testimony is not credible and what evidence undermines the
14 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
15 *Shalala*, 12 F.3d 915,918 (1993).

16 The ALJ partially credited plaintiff's testimony. He found
17 credible Mr. Owen's complaints of confusion, mood disturbance,
18 difficulty concentrating, thoughts of suicide, and memory
19 problems, to the extent they describe limitations associated with
20 continued drug use (Tr. 341).

21 With respect to claimed limitations when DAA is excluded, the
22 ALJ gave several reasons for discrediting plaintiff's complaints:
23 Mr. Owen failed to comply with treatment for hepatitis C, his
24 testimony is inconsistent with statements to treatment providers,
25 and he has been dishonest about drug use (Tr. 344). Each is a
26 clear and convincing reason supported by substantial evidence.

27 At the last hearing, in September of 2008, plaintiff
28 testified he quit all illegal drugs three or four years earlier

1 (2004 or 2005), and stopped drinking in 2003 (Tr. 990,994). Six
2 months before this testimony, a treatment provider notes plaintiff
3 "uses drugs weekly, cocaine and THC" in unknown amounts (Tr. 855).
4 The ALJ points out Mr. Owen tested positive for methamphetamine in
5 November of 2007. In March of 2008, plaintiff admitted he
6 continued using cocaine (Tr. 344, referring to Exhibits B-49F and
7 45F); see 3/7/08 at Tr. 849: says "has been doing a little bit of
8 drugs"; and 3/14/08 at Tr. 850: reports last used cocaine a week
9 ago and methamphetamine a month ago). As the Court held in
10 *Verduzco v. Apfel*, 188 F.3d 1087,1090 (9th Cir. 1999),
11 untruthfulness about substance abuse is a clear and convincing
12 reason to reject a claimant's testimony.

13 Plaintiff has not complied with treatment (Tr. 340) and gives
14 no good reason for failing to do so. In 2001, Mr. Owen underwent a
15 year of treatment for hepatitis C but, as the ALJ notes,
16 apparently drank, causing treatment to fail (Id., citing Exhibit
17 B-12F; Tr. 220). Mr Owen began interferon treatment again in 2007.
18 The ALJ notes in November of 2007, treatment provider Clinton
19 Hedges, PAC, opined plaintiff was blatantly noncompliant with
20 treatment and failed to return for followup appointments (Id.,
21 citing Exhibit B-44F; Tr. 820-822;960). Despite Mr. Owen's history
22 of asthma, the ALJ observes, he continues to smoke against medical
23 advice (Tr. 340 citing Exhibit B-37F; Tr. 637,639). Failing to
24 follow a prescribed course of treatment can cast doubt on a
25 claimant's sincerity. *Fair v. Bowen*, 885 F.2d 597,603 (9th Cir.
26 1989); *Thomas v. Barnhart*, 278 F.3d 947,958-959 (9th Cir. 2002).

27 The ALJ's reasons for finding plaintiff less than fully
28 credible are clear, convincing, and fully supported by the record.

1 See *Thomas*, 278 F. 3d at 958-959 (proper factors include
2 inconsistencies in plaintiff's statements, inconsistencies between
3 statements and conduct, and extent of daily activities).

4 The ALJ is responsible for reviewing the evidence and
5 resolving conflicts or ambiguities in testimony. *Magallanes v.*
6 *Bowen*, 881 F.2d 747,751 (9th Cir. 1989). It is the role of the
7 trier of fact, not this court, to resolve conflicts in evidence.
8 *Richardson*, 402 U.S. at 400. The court has a limited role in
9 determining whether the ALJ's decision is supported by substantial
10 evidence and may not substitute its own judgment for that of the
11 ALJ, even if it might justifiably have reached a different result
12 upon de novo review. 42 U.S.C. § 405 (g).

13 The record shows the ALJ gave clear and convincing reasons
14 supported by substantial evidence for his unchallenged credibility
15 assessment.

16 The ALJ considered Dr. Moore's testimony:

17 [Dr. Moore] "originally listed some mental
18 limitations the claimant would have if he stopped
19 using drugs, but on further consideration, she
20 stated that she could not determine what the
21 claimant's mental limitations would be absent
22 his substance abuse"

23 (Tr. 345).

24 The ALJ explains the revision:

25 Dr. Moore noted that the various mental health
26 evaluations indicated that the claimant was very
27 impaired, but they had believed the claimant's
28 substance abuse was in remission and did not
29 consider that the claimant's mental limitations
30 were caused by his continued drug use.

31 (Tr. 342).

32 The ALJ points out Dr. Moore is the only mental health
33 professional who had accurate information about plaintiff's

1 ongoing substance abuse (Tr. 341). This alone is a specific,
2 legitimate reason to discount the contradicted opinions of the
3 other examining and reviewing professionals.

4 Mr. Owen told Dr. Ashworth in September of 2001 he last drank
5 and smoked marijuana more than a year ago (Tr. 147). Dr. Ashworth
6 diagnosed depressive disorder, NOS, and polysubstance abuse in
7 full sustained remission by self report (Tr. 150). In October of
8 2001, agency reviewing psychologist Michael Brown, Ph.D., assessed
9 DAA in remission; there is no notation the remission is self-
10 reported (Tr. 156,164). It appears any period of sobriety was
11 unfortunately short lived. Plaintiff's liver function was worse in
12 April of 2002 than in July of 2001, according to treating
13 physician Edmund Gray, M.D. (Tr. 206).

14 On March 5, 2003, Dr. Pollack assessed polysubstance
15 dependence in remission, presumably by self-report (Tr. 214).
16 Plaintiff told Dr. Pollack he stopped using but had one relapse at
17 Christmas (Tr. 211). Mr. Owen tested positive for methamphetamine
18 on March 29, 2005 (Tr. 598). On July 10, 2007, plaintiff told
19 evaluators Amy Crow and Angelique Tindall, Ph.D., he smoked
20 marijuana all day every day, until stopping a year earlier (Tr.
21 903). The ALJ properly rejected Dr. Pollock's opinion because it
22 failed to take into account ongoing DAA (Tr. 345). Any error in
23 the ALJ's other reasons is clearly harmless since it is unlikely
24 to change the result.

25 Lance Harris, Ph.D., evaluated plaintiff on March 18, 2005
26 (Tr. 581-586). Dr. Harris initially diagnosed several mental
27 disorders, including amphetamine dependence in alleged full,
28 sustained remission, until he saw the results of a March 29, 2005,

1 sample tested positive for methamphetamine (Tr. 587). He did not
2 re-evaluate plaintiff but attached the test results to his report.
3 Again the ALJ properly discounted diagnoses based on inaccurate
4 information with respect to ongoing DAA (Tr. 341).

5 Dr. Mabee assessed plaintiff on June 2, 2006, and June 4,
6 2007 (Tr. 615-617, 790-794). At the first evaluation Mr. Owen
7 claimed three years of abstinence; at the second, he reported no
8 use of alcohol or drugs at this time (Tr. 617, 791). Dr. Mabee did
9 not diagnose DAA-related disorders in either evaluation. Dr. Moore
10 points out the second evaluation is notable "in that there was no
11 questioning at all about the role of substance abuse," even with
12 "red flags" of invalid PAI results and vague answers (Tr. 860,
13 referring to Tr. 792).

14 Gregory Charbonneau, Ed.D., evaluated Mr. Owen on January 16,
15 2007 (Tr. 623-627). Plaintiff stopped drinking completely in 1999
16 or 2000. He used methamphetamine "quite a bit and for a long time"
17 (Tr. 624). Dr. Charbonneau diagnosed cognitive disorder, NOS and
18 dysthymic disorder, but nothing DAA-related (Tr. 627).

19 On March 14, 2008, Matthew Layton, M.D., assessed (among
20 other conditions) polysubstance dependence in partial remission
21 (Tr. 865). Dr. Layton appears to similarly rely on plaintiff's
22 unreliable self-report with respect to his drug use, since Mr.
23 Owen told treatment providers at Spokane Mental Health on March 7,
24 2008, he has been doing a little bit of drugs (Tr. 849), and on
25 March 27, 2008, he uses cocaine and marijuana weekly (Tr. 855).

26 After Dr. Moore learned of plaintiff's ongoing substance
27 abuse, she reviewed past evaluations (Tr. 860). She observes Dr.
28 Mabee's June of 2007 and Dr. Tindall's July of 2007 evaluations

1 are notable for vague answers, admitted DAA with effects obvious
2 on testing, and highly elevated and invalid scores. Dr. Moore
3 opines the record does not fully support a dementia diagnosis;
4 test scores are much more revealing of ongoing DAA. She concludes
5 the vagueness attributed to dementia or mood disorder are just as
6 likely due to DAA. Dr. Moore determined she could make no ratings
7 without the effects of DAA (Tr. 860).

8 The ALJ properly weighed the evidence of psychological
9 impairment. He answered the relevant question on appeal and found
10 DAA material to the disability determination, a finding fully
11 supported by the record and free of legal error.

12 **C. Evidence of physical impairment**

13 Mr. Owen alleges the ALJ failed to properly weigh evidence of
14 his physical impairments. The Commissioner responds the ALJ
15 properly considered all of the evidence of physical impairment,
16 including the opinions of Dr. Rodkey, Fred Price, D.O., Philip
17 Delich, M.D., and Louise Harder, M.D. (Ct. Rec. 19 at 14-16).

18 Plaintiff asserts the ALJ failed to credit Dr. Gray's April
19 of 2003 opinion Mr. Owen's lung and liver problems were unlikely
20 to improve (Ct. Rec. 17 at 23). Dr. Gray opined plaintiff's
21 breathing problems were unlikely to improve *unless he quit smoking*
22 (Tr. 574-575)(italics supplied). Although Dr. Gray believed
23 plaintiff's liver problems were unlikely to improve short of a
24 scientific breakthrough (Tr. 575), the Commissioner correctly
25 observes plaintiff's subsequent improvement contradicted Dr.
26 Gray's opinion.

27 In November of 2006, treating physician Philip Delich, M.D.,
28 found no cirrhosis and normal liver enzymes (Tr. 633). Dr. Rodkey

1 notes results of a pulmonary function test on April 13, 2006,
2 showed only mild COPD limitations (Tr. 937).

3 With respect to plaintiff's other claimed limitations, Fred
4 Price, D.O., examined Mr. Owen on June 26, 2004 (Tr. 525-533). He
5 pointed out plaintiff took no medication and was not in mental
6 health treatment (Tr. 527). Hobbies included working on cars. Dr.
7 Price assessed an RFC for medium work (Tr. 527, 533). In April of
8 2006, examining doctor Louise Harder, M.D., assessed no severe
9 impairments except urinary incontinence "which may improve with
10 treatment" (Tr. 590). In January and March of 2008, treatment
11 provider Barbara Tritt, PAC, noted plaintiff's medications worked
12 well to control urinary symptoms and GERD (Tr. 892,984).

13 The ALJ properly considered plaintiff's credibility when he
14 weighed the contradictory medical opinions. He also relied on Dr.
15 Rodkey's testimony, to the extent it was supported by the record,
16 and on the opinion of treating sources.

17 The record as a whole fully supports the ALJ's determinations
18 Mr. Owen is disabled when DAA is included and DAA is contributing
19 factor material to the disability determination.

20 The ALJ's assessment of the medical opinion and other
21 evidence is supported by the record and without legal error.

22 CONCLUSION

23 Having reviewed the record and the ALJ's conclusions, this
24 court finds that the ALJ's decision is free of legal error and
25 supported by substantial evidence..

26 IT IS ORDERED:

27 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 18**) is
28 **GRANTED.**

1 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 16**) is
2 **DENIED.**

3 The District Court Executive is directed to file this Order,
4 provide copies to counsel for Plaintiff and Defendant, enter
5 judgment in favor of Defendant, and **CLOSE** this file.

6 DATED this 19th day of May, 2010.

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10 s/ James P. Hutton

11 JAMES P. HUTTON
12 UNITED STATES MAGISTRATE JUDGE
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